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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-420

RUDY MONTANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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OPINION BELOW

Petitioner, Rudy Montano, hereby applies for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment rendered by said court in the above entitled cause. The opinion of the Court of Appeals

herein is appended hereto and designated as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals in the instant matter was entered July 5, 1972. A petition for rehearing was thereafter filed by petitioner, and the same was denied by the order of the Court of Appeals filed August 9, 1972. A copy of said order is appended hereto and designated as Appendix "B" to this petition. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1).

REASONS FOR HEARING

A hearing is respectfully requested in the instant case for the following reasons:

(1) The decision below is contrary to the decision of this Court in the case of Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946), and disregards the principles enunciated therein

respecting conspiracy prosecutions.

(2) The decision below ignores the realities of trial experience as recognized and expressed in Kotteakos with respect to guilt transference among improperly joined defendants and erroneously seeks to affirm the trial court action in the matter on the basis of a single, general instruction of the law given to the jury hearing the cause.

(3) The proceedings below resulted in an unfair trial of petitioner, and his conviction cannot be sustained without seriously affecting not only his due process rights but those of others who may be similarly prosecuted in the future if the judgment below is not set aside.

STATEMENT OF CASE

The present case involves the prosecution of a single count conspiracy indictment in which petitioner and seven other parties were accused of conspiring to unlawfully import heroin into the United States and to sell and transport such heroin after its importation. The acts

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charged as the basis of the conspiracy were alleged to have occurred between March and September, 1968, and as alleged in the indictment concerned the separate sales by Maria Bueno de Macias of heroin from Mexico to various parties in the United States, including petitioner, in which Lorenzo Rodriguez acted as the delivery agent. In the indictment and the alleged overt acts in support of the conspiracy accusation, no relationship or connection between the several accused heroin buyers was shown, and the sole basis for the single conspiracy count involving each of these parties appears to be their alleged common source of heroin supply and delivery man.

ISSUE PRESENTED

The issue raised by the instant case concerns the propriety of the single count conspiracy prosecution as occurred below and requires two determinations:
(1) whether the allegations and supporting evidence establish one conspiracy involving all parties as charged or multiple conspiracies on the part of each accused buyer

separately with de Macias and Rodriguez; and (2), if the latter, whether the trial of petitioner below on the single conspiracy basis violated his right to a fair trial on the question of his individual guilt or innocence because of inadmissible evidence allowed to be received at the trial.

PETITIONER'S CONTENTION

Petitioner maintains that it was improper to try him on a single conspiracy count basis on the facts both as alleged and proved in the instant case, and that such trial served to prejudice the case against him because of otherwise inadmissible adverse evidence received at his trial which the jury could not, notwithstanding a general instruction of the trial court, disregard in determining his guilt or innocence. Petitioner submits that only on a separate trial of his alleged violation of law could a fair trial be had, as will be amplified in the discussion below.

DISCUSSION OF ISSUE

A discussion of the issue involved in the case at bar requires first a statement outlining the procedural background of the case and second a summary of the substantive evidence adduced at the trial. Following these, an analysis of the case can be presented.

PROCEDURAL INFORMATION

Indictment No. 9045 Criminal was returned by the Grand Jury in June, 1970 in the United States District Court for the Southern District of California. Named therein as defendants and charged jointly with conspiracy to violate Title 21, United States Code, §174 with respect to the unlawful importation and sale of heroin were Maria Bueno de Macias, Adrian Hernandez, Travis Rankin, Laura Wilson, Charles Griffin, Joseph Balfour, Patrick Hamlin, and petitioner Rudy Montano. De Macias and Hernandez were not apprehended on the indictment. The remaining parties, including petitioner, were so apprehended and their joint prosecution was commenced.

Petitioner pleaded not guilty to the charge contained in the indictment and prior to trial moved to dismiss the indictment for improper joinder of parties on the single conspiracy count basis. This motion, submitted in writing with accompanying affidavits and points and authorities, was denied by the trial court.

On August 24, 1971 the case proceeded to jury trial as to petitioner and defendant Charles Griffin, other disposition having been made of the matter as to the remaining parties, Rankin, Wilson, Balfour, and Hamlin. The trial concluded on August 26, 1971, on which date the jury returned individual verdicts against petitioner and Griffin finding each guilty as charged in the indictment. Petitioner thereafter, on September 27, 1971, appeared for sentencing, and judgment was imposed on him sentencing him to imprisonment for a term of fifteen years. A notice of appeal was thereupon timely filed on his behalf and the matter heard before the Court of Appeals, from whose judgment the within petition for Writ of Certiorari is now submitted.

SUBSTANTIVE EVIDENCE

At the trial of the case, the following testimony was received. Page references are to the Reporter's Transcript for the trial dates August 24-26, 1971.

Patrick M. Hamlin was the first witness called. He testified that he knew a woman named Maria Bueno de Macias, who was the wife of Cruz de Macias and who with her husband was involved in the narcotics traffic in Mexico. According to Hamlin, Maria Bueno and her husband separated in about 1966 and Maria Bueno then began to engage directly in narcotic transactions with persons in the United States with whom contacts had been made for her by a man named Adrian Hernandez. In this activity she used a Lorenzo Rodriguez to make the narcotic deliveries, and on one occasion Rodriguez made such a delivery in the United States to Hamlin. Hamlin himself had been indicted in the instant case but the charge against him had been dismissed. He had never heard of petitioner before the case was instituted but had heard of Travis Rankin generally

in relation to narcotics and knew of Laura Wilson as Rankin's girlfriend (Rep.Tr. pp. 21-30).

Lorenzo Rodriguez was then called as a witness and testified that he knew Maria Bueno de Macias since 1957 and that on March 16, 1968 (his daughter's birthday) he started to smuggle narcotics into the United States for her in order to make money on the deliveries. His first delivery on that date was to petitioner whom he met at the Greyhound bus station in Los Angeles. Rodriguez did not know petitioner before this time but met with him according to arrangements made by de Macias. He had been given a stocking containing a rubber package of six ounces of what he was told by de Macias was heroin, which he carried across the border and gave to petitioner. He did not receive any money from petitioner on this occasion, and the two of them telephoned de Macias in Mexico to clarify the situation concerning payment for the delivery from de Macias on returning to Mexico (Rep.Tr. pp. 31-37).

Rodriguez testified that he thereafter made further like deliveries of what he

believed to be heroin from de Macias to petitioner approximately every two weeks for the next several months. Each time he would be told by de Macias that petitioner wanted to see him, and on most occasions petitioner was at the bus station waiting for him when he arrived. A few times Rodriguez had to telephone petitioner's home after his arrival, and petitioner then came to the station for the delivery. On some occasions Rodriguez was paid for the delivery ($150.00 each) by petitioner and on other occasions by de Macias. Each time Rodriguez received from de Macias several ounces of what he believed was heroin which he delivered to petitioner, but Rodriguez was otherwise without knowledge as to the content of the substance delivered by him (Rep.Tr. pp. 37-40).

About the first week in May, Rodriguez testified, he and de Macias brought a small sample of heroin to petitioner at his home in the San Fernando Valley. The sample was placed on a table, and Rodriguez saw it "tested" by being injected into the arm of petitioner and others present. Following this petitioner got sick, and after a

short while Rodriguez and de Macias returned to Mexico. The next day Rodriguez then made a delivery to petitioner of eight ounces of the material sampled, which he received from de Macias in Mexico and delivered to petitioner in Los Angeles. Rodriguez, however, could not recall specific details of the transaction because there were numerous ones with petitioner and all were generally similar in routine (Rep.Tr. pp. 41-46).

About mid-May (1968), Rodriguez testified, he again went with de Macias to petitioner's home in the San Fernando Valley on Alderado Street and picked up numerous business machines which were there and returned with them to Mexico. A day or two later Rodriguez made another delivery of eight ounces of heroin to petitioner at the bus station. He had received this heroin from de Macias in Mexico and believed it was the trade exchange for the machines received by de Macias (Rep.Tr. pp. 48-49).

Rodriguez further testified that on one occasion in June he made a heroin delivery to petitioner at the Dodger Barber

Shop on Parthenia Street in San Fernando. On this occasion he had been driven to the location of the barber shop from Mexico by an acquaintance who waited for him in the car and did not witness the transaction. He received a payment from petitioner for this delivery which he gave to de Macias on his return to Mexico. Thereafter he continued to meet with petitioner and make deliveries to him at the bus station in Los Angeles at about two week intervals (Rep.Tr. pp. 47-52).

On one other occasion, Rodriguez testified, he went to petitioner's home to pick up some merchandise, including television sets, tape recorders, and guns, for de Macias. On this occasion he was driven to Los Angeles from Mexico by Javier Lozoa. He let Lozoa off at a bar in Los Angeles and proceeded alone to petitioner's home where he obtained the merchandise and loaded it into the car, then picked up Lozoa and returned to Mexico, and there delivered the property to de Macias. The next day Rodriguez then delivered eight ounces of heroin, which he acquired from de Macias in Mexico, to petitioner in Los

Angeles at the bus station, in payment for the merchandise received by de Macias. On the occasion of this delivery, Rodriguez was accompanied by a Maria de Los Angeles who was present during the transaction and the transfer of heroin and money between himself and petitioner (Rep.Tr. pp. 52-56).

Rodriguez testified that his last delivery to petitioner occurred about the end of August (1968). Maria de Los Angeles again accompanied him and was present during the transaction. On this occasion he met petitioner at the bus terminal as usual and entered petitioner's automobile to transfer the heroin and receive the money from him, but petitioner had forgotten the money and had to drive to an address in Van Nuys to get it. After the transaction, he and de Los Angeles returned to Mexico where he delivered the money received from petitioner to de Macias (Rep.Tr. pp. 62-64).

Rodriguez next testified concerning narcotic deliveries made by him to Travis Rankin during mid-1968 for Maria Bueno de Macias. De Macias had received a letter of introduction from Adrian Hernandez to give to Rankin (Government's Exhibit No. 1)

which Rodriguez, however, did not have to use in his initial contact with Rankin an so maintained possession of the letter. Rodriguez first spoke to Rankin by telephone, calling him from petitioner's hous the day the heroin sample was tested ther but petitioner was not aware of the call its subject matter. In this call Rodrigu arranged to meet with Rankin at the bus station, and after leaving petitioner's house he and de Macias did meet Rankin. Rankin and de Macias discussed heroin deliveries and agreed on a price, and Rodriguez thereafter made various such deliveries from de Macias in Mexico to Rankin in Los Angeles. These deliveries were usually made weekly and extended for a period of about two months and generall involved a six ounce quantity. On the last delivery only one ounce of what was supposed to be pure heroin was delivered to Rankin, and on one occasion Rankin's wife (Laura Wilson) received the delivery (Rep.Tr. pp. 64-72).

Rodriguez then testified concerning narcotic deliveries made by him to Charle Griffin in mid-1968 for Maria Bueno de

Macias. He first met Griffin at de Macias' house in Tijuana, Mexico where Griffin was trying to arrange heroin purchases. Subsequently he made two deliveries of heroin from de Macias in Mexico to Griffin in San Francisco. He received Griffin's address and telephone number on Hay Street in San Francisco from de Macias and contacted Griffin there on each occasion. On the second occasion he was accompanied by Maria de Los Angeles. The two deliveries made by him to Griffin were about a month apart and involved three or four ounces the first time and only a heroin sample the second time (Rep.Tr. pp. 72-81).

Rodriguez then testified concerning narcotic deliveries made by him to Joseph Balfour in mid-1968 for Maria Bueno de Macias. The first delivery involved six ounces of heroin. He was driven to Los Angeles by Javier Lozoa on this occasion and met Balfour at a bar in Culver City across the street from M.G.M. Studios. He left the bar with Balfour and a person named Gilbert and went with them to Balfour's house where the transaction was conducted. At this time he observed

Balfour and Gilbert test the material by injecting a portion into their arms. He then went back to the bar and with Lozoa returned to Mexico where he gave to de Macias the payment obtained from Balfour. A week or two later Rodriguez made a second delivery to Balfour. This time he was accompanied by Maria de Los Angeles, and Balfour was again with Gilbert. On this occasion he met Balfour and Gilbert at a gas station in Culver City and went with them to Balfour's brother's house where he delivered seven ounces of heroin to them which they again tested by injection. He then returned with de Los Angeles to Mexico and paid de Macias the money received from Balfour. Rodriguez next made a delivery of eight ounces of white heroin to Balfour for $400.00 an ounce about two weeks following the second transaction, being accompanied again by Maria de Los Angeles and delivering the material to Balfour at his brother's apartment. This heroin was also acquired from de Macias, and Balfour's payment was in turn delivered to her. Rodriguez had one last transaction with Balfour when he met him at a movie theater in Los Angeles and delivered to him an ounce of pure

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heroin, but had to go with Balfour to another location for him to get the money to pay for the delivery, which Rodriguez then gave to de Macias on his return to Mexico (Rep.Tr. pp. 81-92).

Rodriguez further testified that on September 5, 1968 he was arrested by federal agents in connection with his narcotics smuggling activities, was indicted therefor, and remain in jail until March, 1969 when he secured his release on bail and commenced cooperation with the federal agents in an endeavor to uncover his narcotics source in Mexico and secure the arrest of Maria Bueno de Macias. He was unable to regain her confidence again, however, and finally, on his lawyer's advice, in late 1969 or early 1970, gave the federal agents information about the parties in the United States to whom he made narcotic deliveries. His case was still pending at the time of his testimony, and no promises or guarantees had been given him respecting its outcome or disposition (Rep.Tr. pp. 92-94). (The indictment against Mr. Rodriguez was dismissed on Government motion on September 13, 1971, case No. 4517.)

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On cross-examination Rodriguez testified that the Government assisted in his bail release after he agreed to cooperate with the federal agents (Rep.Tr. p. 101); that after he informed the agents of his American contacts and specifically told them about petitioner, he was never directed to telephone petitioner or otherwise contact him so the agents could listen to the conversation (Rep.Tr. p. 104); that in his transactions in the United States he dealt with each party individually so none of them was aware of any other (Rep.Tr. pp. 105-106, 129-130); that when he was arrested in September, 1968, Maria de Los Angeles was arrested with him but he did not know the disposition of her case (Rep.Tr. pp. 107-108); that he did not know the difference in appearance, use, or effect between heroin and other non-narcotic drugs and did not know of his own personal knowledge the content of the material delivered by him to the various parties in the United States but testified only on the basis of what he had been told regarding the material (Rep. Tr. pp. 124-128); that he still had in his possession the paper with Griffin's telephone number on it (which was produced by

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him in court) (Rep.Tr. pp. 132-134).

The next witness to testify at the trial was Javier Lozoa. He testified that he twice drove with Lorenzo Rodriguez from Tijuana, Mexico to Los Angeles, California. The first time he took Rodriguez to a bar across the street from a film studio where Rodriguez met some other people and left with them for about a half hour and then returned and drove back with him to Mexico. On the second occasion he drove with Rodriguez to a bar in Pacoima in the San Fernando Valley, where he remained while Rodriguez used his car, and that when Rodriguez returned for him the car contained various objects (television sets, tape recorders, and guns), which they then brought to a woman's house in La Mesa, Mexico (Rep.Tr. pp. 149-152).

Marshall F. Gaines, a Los Angeles Police Officer, was then called as a witness to identify Government's Exhibit No. 2 as a document taken from Travis Rankin's apartment at the time of his arrest on December 8, 1968 (Rep.Tr. pp. 153-155). The parties then stipulated that in the opinion of Sergeant Ralph L. Schoenever, an expert in

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handwriting analysis and comparison, the handwriting on Exhibits 1 and 2 was made by the same person (Rep.Tr. p. 156).

The final witness to testify at the trial was Joseph Balfour. Balfour testified that in 1968 he met Maria Bueno de Macias and Lorenzo Rodriguez at what he believed was de Macias' home in Tijuana where he had gone with his friend Gilbert to arrange for heroin purchases. He purchased an ounce of heroin at that time and was told to call when he wanted more and was given de Macias' telephone number. Thereafter he called on several occasions to buy heroin which was delivered to him each time by Rodriguez. On the first occasion he and Gilbert met Rodriguez at a bar located across the street from the M.G.M. Studios in Culver City and went with him to Balfour's house where Rodriguez delivered six ounces of heroin to him, which he tested by taking an injection at the time. The second time he and Gilbert met Rodriguez, who was with a girl named Maria, at a bus depot and again went with him to Balfour's house where he received six ounces of heroin and Gilbert one ounce

from Rodriguez. The next occasion he obtained eight ounces of heroin from Rodriguez at $400.00 an ounce and on a final occasion acquired one additional ounce from him, each time first calling de Macias' telephone number in Tijuana to arrange for the deliveries which Rodriguez made (Rep. Tr. pp. 156-168).

Balfour did not know either petitioner or Griffin prior to the indictment in the case; and at the time he made his first heroin purchase from Rodriguez, Balfour asked him if he delivered heroin to anyone else and was told by Rodriguez that he did not, which Balfour believed to be the case (Rep.Tr. pp. 169-170, 201-202).

Lastly, it was stipulated by the parties that agent Peter Fong's testimony at page 4, commencing line 12, page 18, commencing line 20, and page 41, commencing line 10, of the Reporter's Transcript of the evidentiary hearing held April 19, 1971 on petitioner's motion to dismiss the

indictment for lack of speedy prosecution could be read to the jury as if Fong were called and testified in like manner as a trial witness. Per this stipulation Fong was deemed to have testified that when he first spoke to Rodriguez after his arrest, Rodriguez denied any involvement in a narcotic operation; and that in December, 1969, after Rodriguez commenced to cooperate with the federal agents by trying to penetrate the narcotic ring in Mexico, Rodriguez told him that he, Rodriguez, had received information that petitioner was a person receiving heroin from Maria Bueno de Macias, which information Rodriguez indicated he had gotten from someone else (Rep.Tr. pp. 199-201).

The foregoing in substance completed the evidence introduced at the trial of the present case.

ANALYSIS OF CASE

From the foregoing material it appears without serious dispute that the several purchasers of heroin from Maria Bueno de Macias through Lorenzo Rodriguez in this

case had no inter-relationship between themselves but rather at all times acted separately and individually in their respective transactions. Nothing contained in the allegations of the indictment indicates any link, connection, or interaction between these parties, other than their common source of narcotics supply, nor even that these individuals knew or were aware of one another. Though joined in a common conspiracy count, each in effect was alleged to have dealt on an individual and independent basis with de Macias and Rodriguez, a circumstance which the trial testimony, moreover, fully confirmed. Thus Rodriguez several times testified that he was careful not to indicate to any of his contacts his dealings with the others, and Joseph Balfour testified he was under the impression he was the only party receiving heroin from Rodriguez while Patrick Hamlin testified that he did not know any of the other parties charged as heroin receivers (although he had heard the name of Rankin). The record, thus, with respect to both alleged and proved acts, is devoid of any basis for holding that the accused narcotic

purchasers acted in concert with or awareness of each other or as part of a single conspiracy.

This facet of the case was duly recognized by the Court of Appeals in its decision below. At page 7 of its opinion, the Court of Appeals observes:

> "Here, the government's case-in-chief established at least five conspiracies (those involving the two appellants [petitioner Montano and Charles Griffin], and three involving other indicted purchasers of Rodriguez). Although the transactions were conducted in largely the same manner, none of the purchasers had anything to do with one another."

As noted previously, what was established by the evidence in the instant case, the several distinct conspiracies described by the Court of Appeals, was fully reflected in the overt acts set forth as part of the indictment. No less was proved than was alleged in this regard, and accordingly the question of whether a single or multiple conspiracy was involved was not even

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properly a jury issue. The present matter was not one in which the proof was less than expected or where the jury could conclude that a single conspiracy was had. Yet, when petitioner sought to remedy the situation by pre-trial motion, the Government strenuously objected, urging continued prosecution on a single conspiracy theory, which the trial court sustained.

The Government's insistence on a joint prosecution in this case must be carefully viewed to determine if thereby advantage was secured by the Government with consequent prejudice to the parties on trial and to petitioner in particular. The crux of this Court's decision in Kotteakos v. United States, supra, is that a conviction may not be upheld where such prejudice results in a case tried under a single conspiracy theory but which involves distinct multiple conspiracies. To the same effect are numerous Court of Appeal decisions which are cited in the opinion rendered below. In effect, a joint trial in such instance is error, and where prejudice to the defendant appears, a resultant conviction requires reversal. The law in

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this regard is clear; it is in its application to this case that petitioner urges the Court of Appeals erred.

In the case at bar the Government predicated its prosecution on the testimony essentially of one man, Lorenzo Rodriguez. But Rodriguez was a man of little integrity with nothing of positive value to commend to a jury. He was himself deeply involved in the narcotic traffic and had agreed to aid the Government only when apprehended in his own smuggling activity and was in custody facing imminent criminal prosecution. His testimony implicating others was thus highly suspect as based on obvious motivation of hoped for personal benefit. Moreover, his testimony against petitioner was entirely uncorroborated for the Government had made no efforts in this regard to provide any factual support for Rodriguez' accusations. Indeed, Rodriguez's testimony of personal dealings with petitioner was somewhat impeached by agent Fong who testified at an earlier proceeding in the case that Rodriguez had told him he had learned from others that petitioner was involved in narcotic transactions with Maria Bueno de Macias.

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Standing alone, therefore, balanced by petitioner's plea of not guilty, the presumption of innocence in petitioner's favor, the important cautionary instruction respecting consideration of accomplice testimony, and the impeaching character of agent Fong's testimony, Rodriguez's testimony may well have left a jury unsatisfied beyond a reasonable doubt to support a conviction based thereon. In a trial in which petitioner was faced solely with Rodriguez as his accuser, the latter's credibility would be sorely questioned and so substantially and adversely affected by his circumstances as to be a thin, weak thread, indeed, on which to sustain the criminal conviction of another man.

Nor is any of the foregoing considerations a matter only of hindsight reflection. All of them were apparent from the outset of the case and amply manifest at the time petitioner made his pre-trial motion on the issue under discussion. The Government clearly was aware of these factors and must have recognized the critical importance to its prosecution of obtaining support for Rodriguez's testimony. And, it appears,

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such support became available through the single conspiracy theory of prosecution which the Government persisted in pursuing notwithstanding the legal and factual deficiency of its position.

Thus, under this theory, Rodriguez was allowed to testify not only regarding his alleged dealings with petitioner but also as to his various transactions with other petitioner was unaware of and had nothing to do with and hence could not controvert. Moreover, by this means, such other individuals were allowed to appear and testify in confirmation of Rodriguez's testimony concerning his transactions with them, as Patrick Hamlin and Joseph Balfour did in the case. Such confirmation could only serve to enhance Rodriguez's credibility before the jury, which was further buttressed by his exhibiting the letter of introduction from Adrian Hernandez to Travis Rankin to support his testimony of narcotic transactions with Rankin.

The import of the above and its effect on the jury is obvious: if Rodriguez has testified truthfully and accurately as to these other matters, has he not also

testified truthfully and correctly regarding petitioner? The certain, positive response of the jury to such implicit inquiry renders moot any defense attempt to question Rodriguez's credibility as it pertains to petitioner. Yet just as obvious is the legal bar to the admission of such collateral evidence in any individual trial of petitioner. In a trial of petitioner alone, as ought to have occurred in the present case, no such buttressing of Rodriguez's testimony, critically important as it was to the prosecution, would have been permitted. Evidence pertaining to other, separate transactions involving Rodriguez, and corroborative testimony with respect thereto, would have been inadmissible in such a trial. It cannot, therefore, be sanctioned in the proceedings below, and its prejudicial effect on petitioner before the jury cannot be disregarded or minimized.

Nor can such impropriety be cured, as the Court of Appeals concluded, by a cautionary instruction such as was given by the trial court that the jury should disregard evidence not pertaining to

petitioner unless a single conspiracy were found to exist, for the force of the irrelevant evidence in this connection is not in its direct reference to or inculpation of petitioner in any offense but rather in its weighing of the principal witness - Rodriguez's, credibility more strongly in the jury's mind. The jury cannot reasonably be expected to erase from its mind its conclusion that such witness is credible even if it could, per a general, non-specific instruction, disregard the inadmissible particulars on which such a conclusion was predicated. The resultant impression of witness credibility, on which the entire case against petitioner here depends, would nonetheless remain in this situation, to the substantial prejudice of the demands of a fair trial.

In United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), relied on by the Court of Appeals, below, it is suggested by dictum that the limiting or cautionary instruction used in the instant case could cure the defect and error of a single conspiracy prosecution of several defendants where multiple conspiracies in fact

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exist by avoiding the "guilt transference" referred to in Kotteakos and thereby precluding prejudice to individual defendants from a consideration of evidence directed towards co-defendants. However, the instances in which this would obtain must be limited to matters where the evidence to be disregarded as to a particular accused serves no purpose other than to inculpate another accused. The jury in such a situation can then effectively distinguish the evidence pertaining to the various accused parties and consider only that relevant to each. But where the separate evidence respecting one party, or as to others who are not even parties to the action, serves also to enhance the credibility of a second party's sole accuser, as is the case at bar, then a circumstance comparable to that described in Bruton v. United States, 391 U.S. 135, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968), arises, and prejudice results notwithstanding the giving of a cautionary instruction. To conclude otherwise would ignore the "practical and human limitations of the jury system", of which in this case, it is submitted, the Government was cognizant and took full advantage in its choice

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of a single conspiracy, joint trial prosecution.

It is today well accepted judicially what earlier had received only tacit recognition, that in certain areas of trial activity cautionary or limiting instructions to juries cannot effectively erase from the jury's mind evidence improperly received and heard and cannot therefore obviate the prejudicial effect of such evidence. This is particularly so in the area of co-defendant declarations, as Bruton and People v. Aranda, 63 Cal.2d 518, 47 Cal.Rptr. 353 (1965), so aptly reflect. It is also so in the area of alleged involuntary confessions, as concluded by this Court in Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964). Equally, it is submitted, is it so in cases such as the present where the effect of the improperly introduced evidence is to enhance a witness' credibility and where the sole determinant of whether the defendant stands convicted or acquitted is whether the jury finds that witness believable. To say that in such instance the jury could disregard not only the improper evidence heard (the

truthfulness or accuracy of which is not controverted) but as well divest itself of impressions formed regarding the witness' credibility would be to call upon the jury to perform "mental gymnastics which is beyond, not only their powers, but anybody else". The prejudice in such a case remains notwithstanding the instruction given.

TRIAL FAIRNESS

The single criterion of a sound legal system is the fairness of its trial procedure. It is not fair to allow the Government to select an improper mode of prosecution whereby it secures a manifest advantage in buttressing its principal witness' credibility through the use of inadmissible evidence and then avoid the obvious prejudice to the accused by having the trial court give the jury an instruction that anyone experienced in trials knows cannot be obeyed. In the present matter it is unfair to allow the Government the right to choose at the outset a single conspirary theory of prosecution

when its own alleged overt acts showed, and what later at trial was proved, multiple separate conspiracies, by which prosecution the case was literally stacked against petitioner on the critical issue presented, Lorenzo Rodriguez's credibility, through the introduction of evidence plainly inadmissible against petitioner. Such unfairness cannot be undone by any limiting or cautionary instruction, and such unfairness should not be permitted to continue. It is important to petitioner and all others subject to like Government prosecution that trial procedures be mandated which require the Government to prove its case by the use only of properly admitted evidence. In the instant matter, if the Government believes Rodriguez credible enough to convict petitioner and imprison him for 15 years, then let the Government present Rodriguez alone (and any other evidence admissible against petitioner) to a jury so the case against petitioner may be determined on its merits unaffected by irrelevant and prejudicial material. Petitioner asks for no more; he is, it is submitted, entitled to no less.

APPLICATION

It is, therefore, respectfully requested, on the basis of the arguments presented and the authorities cited hereinabove, that the within petition for writ of certiorari be granted and the matter set for hearing on the Honorable Court's docket.

Respectfully submitted,

HOWARD E. BECKLER

Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CHARLES E. GRIFFIN, *Defendant-Appellant.*	No. 71-2940
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RUDY MONTANO, *Defendant-Appellant.*	No. 71-2984

[July 5, 1972]

On Appeal from the United States District Court for the Southern District of California

Before: KOELSCH and TRASK, Circuit Judges, and BYRNE, SR.,* District Judge.

BYRNE, District Judge:

At a jury trial, appellants Griffin and Montano were found guilty on one count of conspiracy to import heroin into this country, a violation of 21 U.S.C. §174. Each appellant was sentenced to fifteen-year prison terms.

Appellants initially argue they were denied the right to due process and to a speedy trial because of the government's dilatory conduct in bringing their case to trial. The facts surrounding this argument are not in dispute. On June 10, 1970, the Grand Jury returned a one-count indictment charging appellants and six others with conspiring to import and bring heroin into the

*Honorable William M. Byrne, Sr., United States Senior District Judge, Central District of California, sitting by designation.

United States. The overt acts relating to appellants were alleg to have been committed in 1968. In September of that yea Agent Peter Fong of the United States Bureau of Narcotics an Dangerous Drugs arrested Lorenzo Rodriguez for violation o Federal narcotic laws. Subsequent to this arrest, Fong met wit Rodriguez in March of 1969 at the latter's request. At this mee ing, Rodriguez stated that Maria Bueno de Macias, a resident o Mexico, was his source of narcotics. Rodriguez also implicate three men as being connected with his supply of narcotics. As a result of this conversation, Rodriguez secured his release on ba and was instructed by Agent Fong "to penetrate the organiza tion in which he was involved, the smuggling of narcotics in Mexico."

The effort to "penetrate" the Mexican organization proved futile, and in September of 1969, Fong directed Rodriguez' atte tion to divulging the identities of his American contacts. At thi time, Rodriguez named Montano as one such contact. In Decembe of that year, Rodriguez indicated that "C.G." (later identifie as appellant Charles Griffin) was another such contact.

Within the next three to four months, the remaining contact were fully identified. Thereafter, Fong and his co-agents sub mitted their case to the office of the United States Attorney which secured a secret indictment in June, 1970. Hoping that de Macias would return to the United States,[1] the government delayed the issuance of arrest warrants for the indicted defend ants on the ground that such action would alert de Macias of the Grand Jury's charges and thus precludes her re-entry into this country. When the hoped for return of de Macias did not occur the government finally issued arrest warrants for the remaining indicted co-conspirators on February 1, 1971. Two months later the trial court denied appellants' motion to dismiss for failure to prosecute.

The government's delay in seeking immediate indictments even though it had learned of appellants' alleged illicit conduct, and its further procrastination in seeking arrest warrants and in commencing its prosecution constituted in the appellants' view

[1]In September, 1969, Agent Fong was advised by a customs agent that de Macias had entered the United States at Douglas, Arizona. Believing he lacked sufficient probable cause, Fong chose not to order her arrest.

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denials of Fifth and Sixth Amendment guarantees. Specifically, appellants contend that the unjustified delaying tactics of the government seriously prejudiced their "ability to recall and to secure evidence of [their] activities at the time of the events in question."

Recently, the Supreme Court addressed itself to the very contention raised by the instant appellants. In *United States v. Marion*, 404 U. S. 307 (1971), it was argued the defendants had been deprived of their rights to due process and a speedy trial because 38 months elapsed from the time the government learned of their alleged criminal conduct and the time an indictment was returned charging them with these crimes.

The court rejected both contentions. Firstly, it held that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event that occurred in this case only when the [defendant was] indicted . . ." 404 U. S. at 313. Accordingly, the court stated that "the reach of the [Sixth] amendment [does not extend] to the period prior to arrest." 404 U. S. at 321.

The ruling in *Marion* clearly disposes of appellants' assertion they were denied their Sixth Amendment rights. The thrust of their position is that the denial to a speedy trial commenced at the time the government was informed of their criminal conduct, but delayed upwards of eight months to secure indictments from the Grand Jury. Because the Sixth Amendment guarantees do not extend to persons who do not stand "accused" of any crime, the argument advanced must be rejected.

Secondly, the court acknowledged the possibility of a due process violation if the pre-indictment delay resulted in "substantial prejudice" to the defendant's ability to receive a fair trial and was employed as an "intentional device to gain tactical advantage over the accused." In so acknowledging, the court indicated that an indictment returned prior to the running of the statute of limitations was generally considered a safeguard against the prosecution of stale crimes. Additionally, the court ruled that real prejudice must be shown, and that mere possibilities "that memories will dim, witnesses [may be] inaccessible, and evidence [will be] lost" are not sufficient to establish a due process violation.

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In the present situation, the indictment was returned within the statutory period as were the execution of the arrests. Although they claim to have been prejudiced by the delays, appellants have failed to set forth any specific examples of such prejudice. Although the appellants charge that the "delay in the case at bar was inordinate . . . and unjustified," they fail to set forth anything other than bald conclusions which might even approach the possibility that the government's purpose was to gain a tactical advantage over them. In short, the appellants' conclusory allegations are without persuasion that they have been denied the right to due process.

Appellants further contend that the trial court erred when it denied their motion to dismiss the indictment. The basis of this motion was improper joinder in that the indictment charged one conspiracy but the government's case-in-chief "indicated several separate conspiracies" were involved. In appellants' view, combining several conspiracies into one charge worked to their "serious" prejudice because associating them with the other defendants constituted a "guilt transference."

The basis of the contention that the evidence adduced by the government in its case-in-chief was at odds with the Grand Jury's single count indictment is the testimony of Rodriguez, described by appellant Montano as "a man willing to implicate anyone he believed necessary in order to curry favor with the Government on his own pending narcotics smuggling case." In his testimony, Rodriguez indicated that he had been careful to meet with only one contact at a time and that de Macias' policy was not to disclose the names of other contacts at these meetings. Rodriguez' adherence to this policy was such that two of the persons indicted with the appellants testififfied as to having no knowledge of their supplier's other contacts. Indeed, one of these defendants, Joseph Balfour, stated Rodriguez had told him that he was his only purchaser. Balfour believed Rodriguez' representation because his first purchase of six ounces of heroin indicated Rodriguez "wanted to make it worth while to come." In sum, the government attempted to prove the charges made in the one-count indictment by eliciting testimony showing that de Macias supplied the heroin to Rodriguez who then served as the Mexican connection, on an individual basis for several different purchasers.

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Appellants liken the instant factual setting to the one in *Kotteakos v. United States*, 328 U. S. 750 (1946). There, thirty-two persons were indicted for a single conspiracy to violate the National Housing Act by inducing lending institutions to make loans which could be offered to the Federal Housing Administration for insurance on the basis of false and fraudulent information. Of those indicted, nineteen were prosecuted, thirteen had their cases submitted to the jury which acquitted two, convicted seven and "hung" on four. The evidence proved at least eight different conspiracies consisting of several defendants whose only connection with each other was that all had their fraudulent applications handled by a broker named Brown. Quoting from the Court of Appeals, the court found this evidence to be at variance with the indictment in that several conspiracies had been proven:

> " 'Thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a "fence" to make them such.' " 328 U. S. at 755.

The court determined that in the context of that case, the variance could not be deemed harmless error. Additionally, the court found the error to be compounded by the trial court's instructions which charged that only one conspiracy was the subject of the indictment and a finding of guilty depended upon the determination that "each of the defendants was a member of that conspiracy." 328 U. S. at 767.

In *Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961), this court held the evidence was at variance with the indictment and that under the circumstances constituted prejudicial error within the holding of *Kotteakos*. There, the six appellants, along with eight indicted co-conspirators and six unindicated co-conspirators, were charged in a single count with conspiring to defraud the United States. The object of the conspiracy was to obtain preferred immigrant status by entering into sham marriages with United States citizens. The court concluded that six conspiracies had been established at trial because each "married couple" was not "interested in any marriage but [its] own." The court came to this conclusion even though one of the indicted co-conspirators

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had been either a witness to or responsible for all the marriages in question.

Similarly, appellants rely upon *Daily v. United States*, 282 F.2d 818 (9th Cir. 1960), where this court had occasion to distinguish the type of evidence which would or would not support a one-count conspiracy indictment. In that case, sixteen persons were the subject of the indictment. Of those indicted, eight had the charges dismissed, one had his trial severed and of the remaining seven, three were acquitted and four were found guilty. The essence of the conspiracy was to sell narcotics obtained by way of drug store burglaries. With regard to appellant Ribero, the court found the evidence of sufficient force to support the inference that Ribero "knew that the narcotics he had received and dispensed were but a small part of the total amount of narcotics which his suppliers were distributing through concerted efforts." The court based its finding on the fact that Ribero had received drugs from three indicted co-conspirators, including the scheme's "central figure," as well as from an unindicted co-conspirator. Additionally, at the time Ribero had taken drugs in the presence of the central figure and another co-conspirator, he was told the narcotics had been burglarized from a drug store. On another occasion, Ribero had taken drugs with other co-conspirators.

By contrast, the court determined that the evidence did not support the jury's verdict that appellant Quinn "was connected with a single, overall conspiracy . . .". The court's determination recognized that Quinn had conspired with defendants Graham and Hannah, but resisted concluding he "knew that he and Graham and Hannah were not alone in unlawfully dispensing narcotics." Citing *Kotteakos*, the court held that this variance could not be deemed harmless error.

The government argues that should the court sustain the appellants' position that a variance had been established, this alone would not be sufficient ground for reversal. The government advances a two-prong argument in support of this position. Firstly, it draws an analogy between this factual setting and the one in *Berger v. United States*, 295 U. S. 78 (1935). In *Berger*, it was conceded by the government that the evidence established two conspiracies rather than one as charged in the indictment. Of the two conspiracies one defendant (not Berger) was common to

ach. Despite this variance, the court was of the view that Berger had not been prejudiced by this error. In so ruling, the court likened the situation to one where four defendants are indicted on two separate conspiracies but the evidence fails to connect one of the persons with one of the conspiracies, thus esulting in a conviction on one count and an acquittal on the ther. Under such circumstances, such a defendant could not laim "his substantial rights [had] been . . . affected." In *Kotteakos*, the court refused to extend the *Berger* reasoning "to situation in which one conspiracy only is charged and at least ight having separate, though similar objects, are made out by he evidence, if believed; and in which the more numerous partiipants in the different schemes were, on the whole, except for ne, different persons who did not know or have anything to lo with one another."

Here, the government's case-in-chief established at least five onspiracies (those involving the two appellants, and three inolving other indicted purchasers of Rodriguez). Although the ransactions were conducted in largely the same manner, none f the purchasers had "anything to do with one another." Even ere we to assume that the circumstances which persuaded the ourt not to extend the *Berger* reasoning to the setting of *Kotteakos* to be present here, we agree with the government that he instant case and those relied upon by appellants are factually istinct.

The second prong of the government's position that the varince did not prejudice the appellants is the following cautionary nstruction read to the jury:

> "Now, suppose—just because I don't know what your findings are going to be—but suppose that you do not find that the government has proven beyond a reasonable doubt the defendants Montano and Griffin were a part of the same single overall conspiracy. I don't know whether you can find that or not. That, of course, is your determination. There is an alternate area of the law that I wish to call to your attention, and that has to do with the individual conspiracies that may be found in this indictment.
>
> "If you do not find beyond a reasonable doubt that the defendant Montano conspired with defendant Griffin—that is they were in the same and single conspiracy—but find that

> the defendant Montano did conspire with Lorenzo Rodrigu and or Maria Bueno and or with others you may, if th evidence so convinces you beyond a reasonable doubt, fin defendant Montano guilty of the conspiracy. Howeve under this circumstance—to which I'm just making refe ence—you cannot consider any evidence except that whic was admitted against defendant Montano. Likewise if yo do not find beyond a reasonable doubt that defendant Griffi conspired with defendant Montano in one single overall co spiracy, but find that the defendant Griffin did conspi with Lorenzo Rodriguez and/or Maria Bueno or with othe you may, if the evidence so convinces you beyond a reaso able doubt, find the defendant Griffin guilty of conspiracy.

By so instructing the jury, the trial court avoided one of the major errors committed in *Kotteakos*, namely failing to differentiate between conspiracies. Indeed, the cautionary practice followed at the instant trial was the very procedure recommended by the Seventh Circuit in *United States v. Varelli*, 407 F.2d 735, 74 (7th Cir. 1969):

> "Since the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several (citations omitted) Therefore, . . . when the possibility of a variance appears, [the district judge] should instruct the jury on multiple conspiracies as well." (citations omitted)

Accord, *United States v. Bless*, 422 F.2d 210, 213 (2d Cir. 1970).

The cautionary instruction largely attenuated any prejudice flowing from the establishment of the variance. Indeed, it should be noted that in none of the cases relied upon by appellants was such an instruction given. Accordingly, we conclude the trial court's action placed a clamp on any possible prejudice which might have seeped from the variance.

As an adjunct to the argument relating to prejudicial variance, appellant Griffin claims the trial court erred in denying his motion to sever. In large part, this claim is a reiteration of the assertions already set forth, e.g., "evidence of deliveries made by Rodriguez with other parties must certainly have prejudiced

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appellant's case adversely, even though he had not connection with these parties or knowledge of their activities."

Absent a strong showing of prejudice, the denial of a motion for severance will not be reversed on appeal. *Daut v. United States*, 405 F.2d 312, 316 (9th Cir. 1968). No such showing was made in the instant case. In support of this view, the government cites *United States v. Patterson*, 455 F.2d 264, (9th Cir. 1972), a case where joinder was deemed proper because the co-defendant had engaged in "schemes [which] were basically the same" and because the defendants had been charged in each count of the indictment, thus "providing a common link between all of the defendants." Additionally, each piece of evidence was "carefully labelled" as to which defendant it pertained. This segregation extended to the trial court's instructions to the jury. Under these circumstances, this court held that claim of substantial prejudice resulting from the denial of severance had not been substantiated.

Here, it cannot be said the joinder provisions of Rule 8 of the Federal Rules of Criminal Procedure had been abused given the fact that the participants in and the *modus operandi* of the illegal heroin importation were virtually identical. Additionally, the trial court's cautionary instruction was sufficient to blunt the force of any serious prejudice which might have surfaced as a result of linking appellants together in the indictment and at trial.

Affirmed.

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EXHIBIT "B"

FILED
Aug 9 1972
Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 71-2984
RUDY MONTANO,	)	
Defendant-Appellant.	)	

Before: KOELSCH and TRASK, Circuit Judges
and
BYRNE, SR., District Judge.

ON PETITION FOR REHEARING

Appellant's Petition for Rhearing is denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-420

RUDY MONTANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner and co-defendant Griffin were convicted of conspiracy to import heroin into the United States, in violation of 21 U.S.C. (1964 ed.) 174. Petitioner was sentenced to imprisonment for fifteen years. The court of appeals affirmed in a comprehensive opinion on July 5, 1972 (Pet. App. A 1-9) and a petition for rehearing was denied on August 9, 1972 (Pet. App. B). The petition for a writ of certiorari was not filed until September 12, 1972, and is therefore out of time under Rule 22(2) of

this Court's Rules. In any event, the petition presents no issue warranting review by this Court.

Petitioner contends that he was prejudiced by the fact that the indictment charged only one conspiracy, but the proof established (as the court below found) five separate conspiracies. This same contention was raised by co-defendant Griffin in his petition in No. 72-5182. We rely on our discussion of the issue in our Memorandum in Opposition in that case [1] as well as on the analysis of the court below as showing why any variance was not prejudicial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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[1] We are providing petitioner's counsel with a copy of our Memorandum in Opposition in No. 72-5182.

☆ U.S. Government Printing Office: 1972—479-088/22